No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

APPELLANT'S REPLY BRIEF

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In our Opening Brief we asserted a number of independent grounds for the reversal of the judgment in this case. Appellee has confined his brief to a rebuttal of those points without introducing any new matters. As a result there is no necessity for venturing into new ground in this reply. We shall confine this brief to a reexamination of our original points in the light of appellee's arguments.

I.

THE SCOPE OF APPELLATE REVIEW

In our Opening Brief (pp. 14-16) we pointed out that Rule 52(a), Federal Rules of Civil Procedure, made the federal equity practice applicable to the review of the trial court's findings in a non-jury case. We attempted to state briefly the principles which have been established as a consequence of the adoption of that rule.

Appellee acknowledges the accuracy of our statement of those principles,[1] but attempts to escape their application by arguing that in the specific cases in which those principles were declared and applied, the facts in issue were established so plainly that the appellate court could have treated the trial court's findings as an "error of law." Seemingly, appellee would brush aside what was said as dicta or careless usage of words.

It would seem to be a sufficient answer to point out that in the cases cited in our Opening Brief, the courts did not indulge in any fictions about a question of fact becoming a question of law when the evidence is very clear. Rather, those decisions dealt quite plainly with the review of questions of fact.

Appellee cites and quotes decisions and texts wherein a more restricted scope of appellate review is indicated. *Adamson v. Gilliland*, 242 U.S. 350, 61 L.ed. 356, 37 S.Ct. 169, antedates the adoption of the Federal Rules of Civil Procedure. The same is true of the quotation from the 1937 Cum. Supp. to O'Brien's Manual of Federal Appellate Procedure. The current edition of that work fully supports the statements made in our Opening Brief.[2]

Some of the cases cited by appellee have been decided since the Federal Rules were adopted. We recognize that some of the

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1. Appellee's Brief, p. 2.

2. See O'Brien's Manual of Federal Appellate Procedure (3d ed., 1941), pp. 19-21, and 1948 Cum. Supp., pp. 69-71.

earlier cases failed to give full effect to the change introduced by the adoption of Rule 52(a), but we think that the cases cited in our Opening Brief indicate that the weight of authority has come to recognize and apply the full implications of that rule and that since the decision of the Supreme Court in *United States v. United States Gypsum Co.,* 333 U.S. 364, 92 L.ed. (Adv. Ops.) 552, 68 S.Ct. 525, there is no longer any room for uncertainty about the scope of appellate review in a non-jury case.

II.

THE CONVERSATION OF FEBRUARY, 1944

In our Opening Brief (pp. 16-23) we contended that the trial court ought to have accepted Mr. Suewer's version of the conversation upon which this case is founded. We pointed out certain inherent improbabilities in appellee's version and the conflict between his testimony on deposition and at the trial.

Appellee replies that what was said is a question of fact to be resolved upon conflicting testimony and that the trial court's resolution of the conflict is conclusive.[3] It is true that the evidence was in conflict, but it certainly is not true that the trial court's decision is conclusive. The finding will be rejected as "clearly erroneous" if

> "* * * the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.* supra, 333 U.S. at p. 395.

Appellee seeks to defend the disparity between his testimony as given on deposition and at the trial by pointing out that on deposition he was testifying under examination by adverse counsel. We doubt that this circumstance excuses the variation.

We contended (Opening Brief, pp. 22-23) that even if appellee's version of the conversation is accepted at face value,

3. Appellee's Brief, p. 7.

it does not support the trial court's finding of what was said. The finding was that Mr. Suewer had promised to recommend an additional amount equal to the reasonable value of appellee's services. But appellee alleged and testified that the promise was to recommend an amount based upon comparable salaries in other steamship companies.

Appellee assures this Court that the distinction is abstract and academic.[4] We respectfully point out that the prevailing rate for appellate judges ranges between $14,000 and $18,000 per year. We think it plain that the reasonable value of the services of any particular appellate judge may be very much above or below that figure.

Appellee says, however, that in the present case it happens there is no difference between the two measures and that this is shown by the testimony of the witness, Parkinson. But Mr. Parkinson's testimony relating to comparable salaries was stricken (Tr. 97, 99). Consequently, there is no evidence in the record relating to comparable salaries.

Appellee urges that the two measures mean the same thing because appellee sometimes testified about "fair compensation" and at other times about "comparable salaries." But under the specific questioning of the trial court appellee became more explicit and definitely stated that the particular basis for the promised recommendation was to be "comparable salaries" (Tr. 84-85).[5]

III.

THE CONVERSATION OF FEBRUARY, 1944, DID NOT CREATE A CONTRACT OF EMPLOYMENT

In our Opening Brief (pp. 23-26) we asserted that even if the finding as to what was said in February, 1944 were to be accepted, it did not create a contract of employment. We pointed

4. Appellee's Brief, p. 17.

5. See Appellant's Opening Brief, pp. 19-21.

out that the question of what was said in the course of that conversation was a question of fact, as to which the finding of the trial court was properly entitled to substantial weight, but that the question of whether such words created a contract was peculiarly a question of law, or at least a question of mixed fact and law, as to which the appellate court is in as good a position as the trial court to draw the inference of contract or no-contract.

We asserted that neither party intended to enter into a contract and pointed out that it was undisputed that Mr. Suewer had informed appellee, and that appellee had understood, that Mr. Suewer had no authority to bind appellant and that he could only *recommend* an additional sum.

We asserted that as a simple proposition of contract law there could be no contract where both Mr. Suewer and appellee assumed that Mr. Suewer had no authority to enter into a contract. Appellee has ignored that contention and offers in reply an argument that, in the circumstances, Mr. Suewer *should* have made a contract because that would have been a wise and prudent thing to do.[6] That is not a sufficient answer and we assert again that on the undisputed facts this point alone is conclusive of the case—there could be no intent to contract in the circumstances and therefore no contract.

A word of explanation about Mr. Suewer's authority will be helpful. We do not doubt that Mr. Suewer had authority to enter into a contract to give appellee an increase in pay. Accordingly we dropped the defense, which was raised at the trial, with respect to Mr. Suewer's lack of authority. That defense was predicated upon the same assumption as Mr. Suewer's own denial of authority. When Mr. Suewer advised appellee in February, 1944 that he had no authority to enter into an agreement to pay appellee a bonus, the kind of bonus to which he

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6. Appellee's Brief, pp. 9-10.

referred was a bonus over and above normal compensation for services, i.e. a reward for faithful service. Mr. Suewer reasonably believed that he had no authority to agree to such a bonus. We believed that he was justified in that conclusion and raised that defense at the trial of this case. It was not until the judgment in this case that it became apparent that the trial court had construed the conversation of February, 1944 as creating an ordinary contract of employment at a higher salary, instead of an agreement to give a bonus over and above normal compensation. Consequently the defense based upon lack of authority became moot on this appeal for it never was intended to apply to the kind of contract that the trial court concluded had been made.

We asserted that for another reason the conversation found by the trial court could not have created a contract, namely, that a promise to *recommend* an additional sum could not give rise to a contractual obligation to pay the sum.

The situation is simply this: an officer of a corporation promises a dissatisfied employee that he will recommend additional compensation. The employee hopefully remains at work. Is there a contract to pay what was recommended?

Merely to state the question would seem to reveal the absence of any element of contract. But in this case the trial court found that such a conversation constituted a new hiring and that the employer thereupon became obligated to pay the additional compensation which was to have been recommended. Mechanically it is impossible to find a contract in such words. If it is a new hiring, as the trial court says it is, then the obligation to pay must have arisen immediately. But what then becomes of the express promise to recommend? That (and it was the only thing promised) becomes merely a futile act having no effect upon the rights of the parties.

Moreover, the very fact that the promise was to *recommend,* rather than to *pay,* refutes any possibility of contractual intent.

If a new contract had been intended why was there not an agreement to pay instead of to recommend? Mr. Suewer had authority to give appellee an increase in pay and had in fact done so the previous year. Appellee had no illusions about that. We respectfully suggest that an employee who has sought a commitment for higher pay but has gotten only a promise on the part of his superior to recommend additional compensation could not possibly have thought he had entered into a contract. Certainly appellee himself would have been greatly surprised to discover that after the conversation he was bound by a contract of employment for the duration of the war. But that is what the trial court inferred in Finding of Fact No. 5 (Tr. 29).

We assert again that nothing in the conversation found by the trial court to have occurred could have given rise to a contractual obligation.

A. Appellee's Argument on Quasi-Contract Principles.

Appellee specifically asserts that this case is based upon an *express agreement* but adds, by way of analogy, a discussion of quasi-contract principles.[7] The short answer would seem to be that if appellee is relying upon an express contract, there is no occasion for discussing quasi-contract principles. It might also be noted that with this admission appellee's second cause of action is abandoned.

But perhaps the point deserves a more careful analysis. It would seem probable that the trial court decided the case on an erroneous application of quasi-contract principles.[8] It may be helpful to point out why such principles have no application to the facts.

Appellee raises the analogy of the case where a prospective employee goes to work for an employer, pursuant to a conversa-

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7. Appellee's Brief, pp. 19-22.

8. See the trial court's order vacating judgment for appellant and directing entry of judgment for appellee (Tr. 24-25).

tion in which an officer of the employer promises to recommend a reasonable compensation for his services. In such a case appellee assures this Court that a promise to pay the reasonable value of the services will be implied from the bare fact of rendition and acceptance of the services. We do not doubt that this would be so. But we do not agree with appellee's second statement that the result should not differ in the present case where appellee was already employed at a substantial salary.

Appellee's argument about quasi-contract principles is based upon theories of unjust enrichment. One who renders services at the request of another without any agreement as to payment is entitled to recover the reasonable value of those services. But where an employee has agreed to work at a certain rate he cannot come into court and assert that the reasonable value of his services was greater than the agreed rate and thereby recover the excess on quasi-contract principles.

In short, the problem is whether there was a contract of employment or not, and if there was, what was the agreed rate? In February, 1944 there was a contract of employment at an agreed rate of $708.33 per month. We claim that that contract was not modified by the conversation of February, 1944 for the simple reason that there was no contractual intent. If this Court agrees with our contention there is no occasion for discussion of unjust enrichment or quasi-contract.

Appellee asserts, however, that the conversation of February, 1944 created an *express agreement* to pay appellee an amount based upon the reasonable value of his services. If that was the agreement of the parties, again there is no occasion for a discussion of quasi-contract principles.

The judgment of the trial court appears to have been based on a misapplication of quasi-contract principles. We very much doubt that the trial court believed that there was actual intent

to enter into a contract in the course of the conversation of February, 1944. We think rather that the trial court, reasoning on quasi-contract principles, started with the premise that where services are rendered and accepted without any agreement for payment, the law will imply a promise to pay the reasonable value.[9]

The difficulty in the application of that principle to the facts is that in February, 1944 appellee was already rendering services under an express agreement to pay him $708.33 per month. The trial court appears to have concluded that the implied-in-law contract superseded the express contract.

The flaw in this application of quasi-contract principles is that until the express contract for $708.33 per month was terminated there would be no occasion upon which the law could imply a promise to pay reasonable value.

It is here that appellee's argument breaks down. We concede that had an outsider rendered services pursuant to the conversation of February, 1944 there would have been an implied promise to pay the reasonable value. But it does not follow, as appellee contends,[10] that the same result should follow where appellee was already employed at an agreed rate.

Until that contract was terminated by the intent of the parties, the law would not imply a promise to pay merely from the rendition of services.

Appellee points out, however, that he was free to quit at any time and argues that since he had such power, his rights should be determined as though he had exercised it. The fact is, however, that he did not quit and the difference is not slight.

Every employee who is not bound by a contract for a specified term has it in his power to quit at any time. Certainly such an employee cannot say that he is entitled to recover the reasonable

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9. The trial court's reasoning is set forth in the order directing judgment for appellant (Tr. 16-17) and in the later order vacating the judgment and directing judgment for appellee (Tr. 24-25).

10. Appellee's Brief, p. 21.

value of his services, although they exceed the agreed rate, simply because he had it in his power to quit. The fact is, of course, that if an employee quits there is very little probability that he will be permitted to continue working under such circumstances and there is no reason to assume that the result would have been different in appellee's case.

The quasi-contract analogy, therefore, is not only inapplicable, but misleading.

IV.

THE RETROACTIVE ADJUSTMENT IN PAY

The trial court found a new contract of hiring in February, 1944 whereby appellee was hired from that date to the end of the war at the reasonable value of his services from December 7, 1944 to the end of the war. We asserted in our Opening Brief (pp. 26-27) that if a contract of hiring resulted from the conversation of February, 1944 it was a contract to employ appellee for the reasonable value of his services *during the period to be covered by the contract,* namely, February, 1944, to the end of the war. We pointed out that an intent to include a retroactive pay adjustment was highly improbable in the circumstances and that we found no support in the evidence for finding such a term in the contract. Appellee has sought to point out the evidence to support this finding. It would be pointless to argue the effect of this evidence at length, and we leave the conclusion to this Court.

In addition, we pointed out that the finding of such a term in the contract contradicted the reasoning by which the trial court deduced the very existence of the contract. The trial court, reasoning upon principles of quasi-contract, concluded that a promise to pay the reasonable value of the services would be inferred from the circumstances. We pointed out that the compensation determined by the trial court to be due necessarily was greater than the reasonable value of what was contracted

for, because it was the trial court's judgment of the reasonable value of the services performed under the contract, plus a retroactive adjustment.

We think that the point is not met by appellee's contention that it would have been reasonable to have made a bargain such as the trial court found.

V.

THE REASONABLE VALUE OF APPELLEE'S SERVICES

We asserted (Opening Brief, pp. 28-30) that the trial court's finding of the reasonable value of appellee's services, which was supported solely by appellee's own words, was contradicted by inferences from other testimony and by undisputed facts.

Appellee seeks to support the finding by asserting that the witness Parkinson evaluated the services testified to by appellee at a minimum of $12,000 per annum (Appellee's Brief, p. 13). We noted this testimony in our Opening Brief and pointed out that Mr. Parkinson's testimony related to the *kind of services rendered during the peak of war shipping business* and did not support, but indeed, contradicted, the finding as to the value of the services during periods in which the volume of business was less—such as the year 1942.

Appellee also asserts that Mr. Parkinson placed such services in the bracket $10,000 to $15,000 per annum for the period 1940-1947.[11] That statement is misleading. Mr. Parkinson did not testify that the reasonable value of appellee's services was in that bracket during the period 1940-1947. In the first place he was testifying about *comparable salaries* rather than the value of appellee's services. Moreover, his testimony was that during the period 1940-1947 the prevailing rate was $10,000 to $15,000 per annum *for duties of the kind appellee performed during the peak period of war shipping business.* That is a long way from supporting the conclusion that appellee's services were worth $10,000 to $15,000 per annum during this period. As we

11. Appellee's Brief, p. 15.

pointed out in our Opening Brief, appellee's services during 1942 were less than in 1941 and less than the high rate of activity during the peak of war activity.

Moreover, appellee neglects to point out that Mr. Parkinson's testimony was stricken (Tr. 97, 99). But even if not stricken it could not aid appellee because if appellee's services at the *peak period* fell into the $10,000-$15,000 bracket they must have been worth substantially less in periods such as 1942.

Appellee asserts that appellant cannot complain about the absence of more adequate testimony on the specific point of the worth of appellee's services.[12] We may ask, why not? The burden was on appellee to establish this point. Moreover our objection is not so much based upon the *lack* of testimony as to the fact that there is actual contrary evidence in the physical circumstances and in the inferences from testimony.

Appellee suggests that perhaps business was fairly active in 1942.[13] This is contrary to counsel's opening statement at the trial (Tr. 41) and to the evidence reviewed in our Opening Brief. Appellee seeks support for the point by invoking a statement contained in Plaintiff's Exhibit 4, which was an application to the Treasury Department for approval of a wage increase. In that statement, which was prepared and filed over appellee's own signature, it was said that in 1941 the company handled 21 steamers in California ports and in 1942 handled 54 steamers. Appellee thereby concludes that business was 2½ times more active in 1942 than in 1941, although the evidence reviewed in our Opening Brief indicates that there was a substantial drop in activity.

But that statement of the number of steamers handled is contradicted by a tabulation in another of appellee's exhibits, Plaintiff's Exhibit 2 (Tr. 113). That exhibit also was an ap-

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12. Appellee's Brief, p. 15.

13. Appellee's Brief, p. 18.

plication to the Treasury Department for approval of an increase. It too was prepared and filed over appellee's own signature. However, it stated that in 1941 there were 56 steamers handled in Los Angeles and San Francisco against only 50 in 1942.

We respectfully submit that the contradictory inferences drawn from these applications to the Treasury Department do not give a reliable picture of business activity and certainly gave no basis for disregarding the well-established fact of a substantial decline in business activity in 1942.

Moreover statistics about the number of steamers handled do not give a true picture in any event, even if the statistics are reliable. The number of steamers handled is not a criterion of the comparative volume or weight of responsibilities during the pre-war and war-time period. In the pre-war period, when appellant was operating its own steamers, the duties were different than those in 1942 and in later years when it operated only as an agent.

As a last resort, appellee seeks to support the finding about the reasonable value of his services by showing the amount received by Messrs. Suewer, Griffin and Bradford. Appellee stretches the evidence in saying that he assumed the duties of Mr. Bradford in 1942.[14] Mr. Bradford was Mr. Suewer's assistant in charge of the United States organization and when he went into the Army Transport Service in 1942 his duties were in fact assumed by Mr. Griffin (Tr. 122-125).

With respect to Mr. Griffin, appellee again stretches the testimony in stating that he was appellee's opposite number on the east coast. In fact, Mr. Griffin was not only head of the east coast office but also was Mr. Suewer's assistant in charge of the entire United States organization and appellee was under his direction as well as Mr. Suewer's (Tr. 122-125).

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14. Appellee's Brief, p. 16.

The amount received by way of bonus or adjustment of pay for Mr. Suewer and Mr. Griffin thus is no standard for comparison as to the value of appellee's own services. Certainly appellee's duties, responsibilities and performance, are in no way comparable to those of Mr. Suewer who, during the war, was left in sole charge of the United States organization and handled this work with considerable success. Moreover, neither Mr. Griffin nor Mr. Suewer received anything pursuant to a contract. The motives and considerations which led the Board of Directors to approve the adjustments in their pay are not relevant to the value of appellee's services.

VI.

THE DEFENSE OF ILLEGALITY

We asserted (Opening Brief, pp. 30-36) that the contract found by the trial court, however the findings may be interpreted, was illegal and void. We pointed out that there were inconsistent findings as to the time for payment. One, which was supported by appellee's allegations in the verified complaint and by inferences from other terms of the contract, set the time for payment without regard to the termination of wage controls. The second purported to find an agreement that payment was to be made after termination of wage controls.

Appellee says that the second is more specific and therefore controls. We do not see why the second is more specific than the first and do not think the second is supported by the evidence.

Appellee asserts that the parties intended payment to be made after termination of wage controls because the "whole reason" for the discussion of February, 1944 was the impossibility of making payment at that time on account of salary controls.[15] It is sufficient to point out that that is not what the parties said.

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15. Appellee's Brief, p. 23.

The only reason expressed by them for delaying payment was the necessity for communicating with the management in Manila for authority to enter into the agreement (Tr. 210, 166).

Appellee says that the end of the war was a loose way of saying the end of salary controls.[16] But the contract of hiring found by the trial court was also to last until the end of the war. Had salary controls been lifted in June, 1944 would the contract have ended? Appellee assures us that it would not, for in his complaint he alleges that the term of the contract was the duration of actual combat warfare which ended on August 14, 1945 (Tr. 3-5).

Appellee urges that a bargain should be construed in such a way as to be legal if that is possible (Appellee's Brief, p. 28). Such a rule of construction cannot supply intent. Moreover, as we point out below, on either interpretation the contract would be illegal.

We pointed out in our Opening Brief that the principles of law applicable to determining the legality of the contract depend to some extent on whether the contract was one to pay at an ascertainable future date regardless of the existence of wage and salary controls or whether it was a contract to pay after termination of wage and salary controls.

In the first situation we pointed out that the great weight of authority established that such an agreement would be illegal and void, because it would be a bargain to do an illegal act, and that it could not be revived by repeal of the prohibitory law. For this proposition we relied upon authorities on the principles of illegality in general and specifically upon the case of *In Re Pringle Engineering & Mfg. Co.* (7 Cir. 1947) 164 F.2d 299. That case is squarely in point. Appellee's attempt to distinguish it on the ground that, because of the subsequent bankruptcy of the employer, there was only a small possibility that the Treasury

16. Appellee's Brief, p. 24.

Department would have approved the bonus is unavailing. Appellee himself recognizes that the bargain which he claims to have entered into here would not have been approved by the Treasury Department. Indeed, he explains that that was the real motive for entering into the bargain (Appellee's Brief, pp. 23, 26-27).

If this Court accepts the finding that the time for payment was set irrespective of the termination of wage and salary controls, then, on the authority of the *Pringle* case and others cited in our Opening Brief, we submit that the contract is illegal and void.

If, however, this Court accepts appellee's argument that the contract was one to pay after termination of salary controls for services rendered during the period of salary control, then the *Pringle* case is not a square decision on that point. Neither are any of the cases cited by appellee.

Appellee cites certain texts[17] indicating that an agreement made with reference to a contemplated change in the law, and not executed until such change is effected, is lawful. The very quotation reveals the failure of the argument, for this contract was intended to be and was executed, at least on appellee's side, before termination of wage controls.

Appellee relies upon the Massachusetts case of *Nussenbaum v. Chambers & Chambers, Inc.*, 77 N.E.2d 780. That case, like the *Pringle* case, involved an agreement made during the period of salary controls for payment at a future date and, prior to the time for payment, salary controls were lifted. The Court sustained the agreement, but the decision is not contrary to the *Pringle* case for, as revealed in the passage quoted on p. 34 of Appellee's Brief, the decision of the Massachusetts court was based upon a presumption of legality and the failure to show that there was no intent to apply for approval of the increase.

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17. Appellee's Brief, p. 29.

In short, the Massachusetts court deemed the agreement to be a tentative bargain for payment which the parties intended to submit for approval. In the present case no such assumption can be asserted. It is perfectly clear from appellee's whole argument that the bargain which he claims to have entered into was not intended to be submitted to the Treasury Department for approval. For appellee explains the whole motive of the contract as one to escape the salary restrictions.

Appellee asserts also that "it was a practical prerequisite" that the parties to an application for approval had entered into a binding contract for such increase. We point out that it is perfectly clear that such a contract could not be binding without approval and could have only conditional effect.

In our Opening Brief we analyzed the purposes and policies of the Stabilization Act of 1942 and pointed out that a bargain to grant wage increases with payment deferred until after termination of salary stabilization would have conflicted with the purposes and policies of that statute. Appellee passes lightly over our analysis of the statute and asserts that the court should not consider the purposes and policies of Congress in enacting the law. We disagree. We pointed out that a contract may be unenforceable because it is contrary to the policy of the law. How then can the policy be irrelevant?

Appellee dismisses our analysis of the purposes of the law by stating that we deal only with post-war inflation and that Congress was more concerned with effective prosecution of the war than with post-war adjustments. Post-war effects were only a small portion of our analysis. We pointed out that the true purpose of the statute was to make possible *price* stabilization by freezing wages and other costs. This sort of bargain would merely defer payment and would not freeze costs at all. The inflationary pressures upon price *during the war* would continue.

Appellee asserts finally that the defense should not be asserted

by appellant because, after termination of salary controls, appellant paid bonuses to other key employees. What was paid to the other employees was not paid by reason of a contract and the problem involved here simply did not arise.

CONCLUSION

Appellee asserts that we have made many contentions in connection with a rather simple agreement. It is true that we raised numerous points of objection to the judgment of the trial court. The complexities which gave rise to those points refute the claim that this is a simple agreement. Indeed, a bargain for a wage increase *should* be a very simple contract. That this bargain is not a simple one is a consequence of attempting to twist a promise to recommend a bonus into a contract to pay a wage increase.

January 21, 1949.

Respectfully submitted,

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